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NO. 83-1979

In The

Supreme Court Of The United States

OCTOBER TERM, 1983

DENNIS M. PERRUCCIO,
Appellant

v.

STATE OF CONNECTICUT,
Appellee

ON APPEAL FROM THE
SUPREME COURT OF CONNECTICUT

MOTION TO DISMISS OR AFFIRM

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BEST AVAILABLE COPY

QUESTION PRESENTED

1. Whether appellant's contentions merit plenary consideration?

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1983

DENNIS M. PERRUCCIO, Appellant

v.

STATE OF CONNECTICUT, Appellee

ON APPEAL FROM THE

SUPREME COURT OF CONNECTICUT

MOTION TO DISMISS OR AFFIRM

The Appellee moves the Court to dismiss the appeal herein, or in the alternative, to affirm the judgment of the Supreme Court of the State of Connecticut on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

STATUTE INVOLVED

The statute involved is Connec-General Statutes §53-21, set out in Jurisdictional Statement at p. 7.

STATEMENT OF THE CASE

This is a direct appeal from the judgment of the Supreme Court of the State of Connecticut dated January 31, 1984, sustaining the conviction of the defendant-appellant of the crime of Risk of Injury (CGS §53-1). Contrary to the statement in FN 3 of that opinion (J.S. p.27), the defendant was sentenced to a term of ten years suspended after one year, to be followed by three years of probation on this count, and a concurrent term of one year on the Sexual Assault in the Fourth Degree count (App. A p. 21)

FACTS

The jury might reasonably have found the following facts: On October 16, 1981, the defendant, a thirty-eight year old teacher caused the victim one of his thirteen year old female students to go to an empty locker room, allegedly to wet a rag to clean his desk at the end of a class period. He went to the room with her and after the heavy steel door closed, he asked her for a goodbye kiss. She kissed him on the cheek. The defendant then turned her body toward his, and while forcefully holding her with his left arm around her back and her arm, he French kissed her on the mouth, forcing his tongue into her mouth. At the same time he put his right hand underneath her shirt and felt her breast outside of her brassiere. He then

pushed her bra up and rubbed her then bare to his touch, breast. Thereafter, and while still holding her, he started to put his hand down the back of her blue jean pants, but she told him not to and he withdrew his hand. At this time another person came into the room and the girl left. The girl didn't consent to this action. She was frightened and stunned, and didn't know what to do, and was afraid that he might hurt her or something. A few days before, the defendant had asked her if she wanted to go skating with him, and she responded she would have to ask her parents. She was permitted to go if she brought a friend with her. (App. B pp. 23-37; J.S. App. A p. 26)

ARGUMENT

I

CONNECTICUT GENERAL STATUTE §53-21 NOT UNCONSTITUTIONALLY VAGUE

As a general rule, the constitutionality of a statutory provision being attacked as void for vagueness is determined by the statutes applicability to the particular facts at issue. United States v. Powell, 423 U.S. 87, 92 S. Ct. 316, 46 L. Ed. 2d 228; United States v. Mazurie,419 U.S. 544, 550, 95 S. Ct. 710, 42 L. Ed 716; United States v. National Dairy Products Corporation, 372 U.S. 29, 32-33, 83 S. Ct. 594 9 L. Ed. 2d 516; State v. Pickering, 180 Conn 54, 57, 428 A. 2d 322. To do otherwise, absent the appearance that the statute in question intrudes on fundamental constitutional guarantees, particularly first amend-

ment freedoms, would be to put courts in the undesirable position of considering every conceivable situation which might possibly arise in the application of complex legislation. United States v. Raines, 362 U.S. 17, 21, 80 S. Ct 519 4 L. Ed. 2d 524. That a statutory provision may be of questionable applicability in speculative situations is usually immaterial if the challenged provisions applies to the conduct of the defendant in the case at issue. United States v. Petrillo, 332 U.S. 1, 7, 67 S. Ct. 1538 91 L. Ed. 1877.

To determine whether or not a statute is void for vagueness the so-called "fair warning principle" is used which mandates that as a matter of due process a penal statute must be sufficiently definite to enable a person

to know what conduct he must avoid. State v. Pickering, supra. "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well recognized requirement consonant alike with ordinary notions of fair play and the settled rules of law." Connally v. General Construction Co., 269 U.S. 385, 391, 46 S. Ct. 1265, 70 L. Ed. 322; Haynes v. Mayor of Oradell, 425 U.S. 610, 620, 96 S. Ct. 1755, 48 L. Ed. 2d 243; Rose v. Locke, 423 U.S. 48, 49, 96 S. Ct. 243, 46 L. Ed. 2d 185; United States v. Mazurie, supra; Smith v. Goguen, 415 U.S. 566, 572 n. 8, 94 S. Ct. 1242, 39 L. 2d 605; United States v. Harriss, 347 U.S. 612, 74

S. Ct. 808, 98 L. Ed. 989; Winters v. New York, 333 U.S. 507, 515-516, 68 S. Ct. 665, 92 L. Ed. 840; Lanzetta v. New Jersey, 306 U.S. 451, 453, 59 S. Ct. 618, 83 L. Ed. 888, Stolberg v. Caldwell, 175 Conn 586, 610, 611, 402 A. 2d 763; State v. Chetcuti, 173 Conn 165, 167, 377 A. 2d 263; Mitchell v. King, 169 Conn 140, 142-143, 363 A. 2d 68. If the meaning of a statute can be fairly ascertained a statute will not be void for vagueness since "[m]any statutes will have some inherent vagueness, for '[i]n most English words and phrases there lurk uncertainties.'" Robinson v. United States, 324 U.S. 282, 286, 54 S. Ct. 666, 89 L. Ed. 944; Rose v. Locke, supra 49-50. State v. Pickering, supra 62. Wharton's Criminal Law and Procedure by Anderson, §18, pp. 34-35 provides "A statute is not unconsti-

tutional as indefinite because it employs general terms, when such terms convey to a person of ordinary understanding and intelligence an adequate description of the prohibited act (citing Jaquith v. Commonwealth, 331 Mass 439, 120 N.E. 2d 189), for impossible standards of certainty are not required (citing United States v. Petrillo, supra)... If the general class of offenses to which a statute is directed can be made constitutionally definite by a reasonable interpretation of the statute, the court should give the statute such interpretation, for when fairly possible, the statute should be construed so as to avoid a danger of unconstitutionality. At the same time, in giving a statute a narrow construction in

order to avoid doubt as to constitutionality, the court must avoid a construction which would seriously impair the effectiveness of the statute in coping with the evil which it was designed to correct." (United States v. Harriss, supra). It is respectfully submitted that the statute as applied to the facts in this case is not vague or indefinite. Common sense tells us that the acts of this defendant amount to those likely to impair the morals of this thirteen year old girl.

Morals in the context of the statute, deals with virtuousness in sexual conduct. As will be set forth hereafter, there are Connecticut statutes (which were in effect at the time of these offenses) dealing with sex offenses which explicitly prohibit the conduct of the defendant, and he

was, at least constructively, on notice as to those prohibitions.

II

RELATED STATUTES DEFEAT ANY CLAIM OF VAGUENESS OF CHALLENGED SECTION

Connecticut General Statutes, §53-21 antedated the adoption of the Penal Code, §§53a-1, et seq. which was enacted in 1969, to be effective on October 1, 1971. §53a-2 provides that "[t]he provisions of this title shall apply to any offense defined in this title or the general statutes..." (emphasis added) Part VI of said code deals with Sex Offenses, §53a-65 (the first section under this part), sets forth definitions for certain terms used in the part. Subsection (3) provides: "'Sexual Contact' means any contact with the intimate parts of a person not married to the actor for the purpose

of sexual gratification of the actor." Subsection (8) provides: "'Intimate Parts' means the genital area, groin, anus, inner thighs, buttocks or breasts." (emphasis added).

It is thus apparant that not only does §53-21, itself, convey "... sufficiently definite warning as to the proscribed conduct when measured by commong understanding and practices"; Jordan v. DeGeorge, 341 U.S. 223, 231-232, 71 S. Ct. 703, 95 L. Ed. 886; but the applicable Connecticut statutes give him "fair-warning"of specifically prohibited conduct. i.e. the touching and rubbing of the victim's breast and the attempt (at least) to have contact with her buttocks, or even possibly her anus, groin or genital area. Add to this the forced "French kissing" and hugging while performing the earlier

described acts and one could only conclude that such conduct was proscribed by the statute.

Although defendant in his Jurisdictional Statement (pp. 16-18), has cited numerous Connecticut cases dealing with the "private parts" of the victim, he does not cite one holding that the Risk of Injury statute is limited to such acts. To the contrary, the Connecticut Supreme Court has frequently held that such statute has broad application to many prohibited acts. In State v. McCall, 187 Conn 73, 92 (1982) it held that sexual intercourse "...is only one of a multitude of acts that would suffice to prove risk of injury' (emphasis added). In State v. Smith, 149 Conn 487, 490-491), the victim, a fourteen year old boy was exposed to drinking parties where he was given

beer on one occasion, girls became drunk and was taken into bedrooms, and he was the victim of a sexual assault by a person other than the defendant. In State v. Hauck, 172 Conn 140 (1976) the defendant, a school teacher, offered to give the victim, a girl under 16, a passing grade if she would allow him to photograph her in the nude and semi-nude, which he later did. On one occasion he touched her private parts.

III

NO UNCONSTITUTIONAL STATUTORY PATTERN IN VIOLATION OF FOURTEENTH AMENDMENT

Defendant-Appellant further claims that §53-21 and 53a-73a(a)(1) form an unconstitutonal statutory pattern. In addressing this claim, he argues that the lesser offense (Sexual Assault in the fourth degree) requires proof

of a specific intent, and thus it is more difficult to prove and thus less intrusive conduct may form a basis for a more serious charge. An examination of the two statutes clearly establishes that such reasoning is faulty.

For a violation of §53-21 (Risk of Injury) the State must prove not only that the proscribed conduct occurs, but in addition that such impairs or is likely to impair the morals of the victim. Such is not required for proof of a violation of §53a-73a (a)(1) (Sexual Assault fourth) but only proof of the touching of intimate parts for the purpose of sexual gratification on the part of the actor... (this latter element, to distinguish it from an unintentional or justified touching e.g. close contact in a crowded elevator

or administering CPR on a female). The former deals with the effect on the victim (the more serious concern) and the latter deals with the effect on the actor - sexual gratification (less serious concern). To make this more evident, consider the following examples:

1) Assume the victim in this case was the 13 year old school prostitute, who invited the defendant into the locker room and enticed him to perform the acts in this case. Because of her age, defendant would still be guilty of Sexual Assault in the fourth degree, but would not be guilty of Risk of Injury because the acts would not impair the morals of the child - nor be likly to do so.

2) Assume the victim, a 13 year

old girl was asleep and the defendant rubbed her breasts for his sexual gratification, and she did not awake, he would be guilty of Sexual Assault in the fourth degree but not guilty of Risk of Injury.

3) Assume an innocent 13 year old girl, the showing of pornographic material to her, or taking nude pictures of her, or allowing her to observe others perform sex acts, there being no touching of the girl, herself, would be a Risk of Injury, but not a Sexual Assault in the fourth degree.

It should be remembered in the instant case, the victim was forced; she did not consent; she was scared and frightened by defendant's acts. She was the kind of girl who, before going skating with defendant had to

get her parents permission, and then could only go if she had another friend with her. From these facts, and the jury's observation of her on the stand, they could reasonably conclude that the acts of the defendant were likely to impair her morals.

"[T]he legislature has the power to define what acts shall constitute criminal offenses and what penalties shall be inflicted on offenders... the expediency of making any such enactment being of a matter of which the legislature is the proper judge... So long as it's enactments do not infringe constitutional rights and privileges express or necessarily implied, it's will is absolute." Wharton's Criminal Law, supra ±16 pp. 25, 26; Coffey v. Harlan County, 159 U.S. 590, 16 S. Ct.

125, 40 L. Ed. 2d 269.

In the instant matter, there is no unconstitutional statutory pattern. The Connecticut legislature has (rightly) established its concerns for the protection of children, and has decreed that the more serious the effect an offender's conduct has on children, the more severely it will be punished.

It probably should be noted that before the Connecticut Supreme Court, Defendant-Appellant claimed that the charge, conviction and punishment for the two subject charges amounted to a violation of the Double Jeopardy clause of the Fifth Amendment (J.S. App. A. p. 30). He has abandoned this claim before this Court in that he has not included it in the Questions Presented (J.S. p. 1), nor has he briefed

it. Your writer, therefore, has not specifically addressed such issue.

CONCLUSION

The Appellee respectfully submits that the questions upon which this cause depends are so unsubstantial as to merit plenary consideration by this Court. The decision of the Supreme Court of Connecticut is not subject to any reasonable attack. The Appellee therefore moves the Court to dismiss this appeal, or, in the alternative, to affirm the judgment of the Supreme Court of Connecticut.

Respectfully Submitted,

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APPENDIX A

JUDGMENT OF TRIAL COURT

STATE OF CONNECTICUT

NEW LONDON COUNTY, SUPERIOR COURT

June Session, 1982

Hon. Seymour L. Hendel, Judge

No. CR 11-42904

STATE	: Upon the information of Harry
VS.	: Gaucher, Jr., Esq.
	: Attorney for the
DENNIS M. PERRUCCIO	: State Judicial District of Windham

charging the said Dennis M. Perruccio with the crimes of

1) Injury or risk of injury to or impairing the morals of a child in violation of Sec. 53-21 Conn. Gen. Statutes; 2) Sexual Assault, 4th degree in violation of Sec. 53a-73a(a)(1)(A) of said statutes, as on file.

The accused appeared on May 20, 1982 and for the plea said "Not Guilty", and elected to be tried by A Jury of six. After a full hearing, the case was committed to the jury which returned a verdict of "Guilty" to both counts.

The Court accepted said verdict.

The Court thereupon deferred the imposition of sentence on the accused, pending the filing of the required presentence investigation report by the State Adult Probation Department, and the case came thence to the present time, when the said presentence report having been filed and considered, the Court then sentenced the accused to be committed to the Commissioner of Corrections for the term of 10 years on Count 1, and 1 year on Count 2 sentences to run concurrently to each other and with Sentences in Case #21-12683 JD but execution of the said sentence however, is, suspended as to Count 1 after one year and the accused is committed to the custody of the State Adult Probation Department for the period of 3 years, and to stand committed until this judgment is complied with.

Date of Conviction June 2, 1982.

Date of Imposition of Sentence June 29, 1982.

Attest,

Frederick Mahler
Clerk

APPENDIX B

EXCERPTS FROM TRANSCRIPT OF TESTIMONY

A - Kimberly Nabozny

1. DIRECT EXAMINATION

Q. Kim, how old are you?

A. Fourteen.

Q. Okay, and what's your date of birth?

A. December 23rd, 1967.

Q. Okay. Would you keep your voice up so I can hear you.

A. (Witness nodded head affirmatively).

Q. All right. Where do you go to school?

A. Ellis Tech.

Q. And what year are you in?

A. Ninth grade.

TR. 93

***

Q. Okay, and what did you talk about on Tuesday?

A. He asked me to go skating.

Q. What kind of skating?

A. Roller-skating.

***

Q. Okay. And could you tell me what he said to you when he asked you to go skating? What exactly did he say?

A. He gave me two tickets in class.

Q. And what did he say?

A. He asked me to go.

Q. Okay, go with him?

A. Yeah.

***

A. I told him maybe; I'd have to ask my parents.

Q. And did you ask your parents?

A. Yes.

Q. What did they say?

A. They said as long as I bring a friend.

Q. As long as --

A. I bring a friend.

***

Q. He was standing to your right and you leaned over and kissed him on the left cheek?

A. Yes.

Q. All right. What did he say or do after that?

A. He said, is that it?

Q. Okay, and what did you say?

A. I didn't say anything.

Q. Then, what did he say or do?

A. He turned me toward him. He put his left arm around me. Then he kissed me and went up my shirt with his right arm.

***

Q. Where did he -- tell me what he did with each of his hands; okay?

A. His left arm was around me, around my back.

Q. Around you where, your shoulder, your waist, what?

A. My back.

Q. Around your back. You were both facing each other?

A. Yeah, after he turned me.

Q. Okay. And then what did he do with his right hand?

A. He went up my shirt.

Q. He went up inside your shirt?

A. Yes.

Q. What did he do with it then?

A. Felt my left breast. And then he went under my bra, did that again. Then he hugged me. He tried to go down the back of my pants. I said, no. Then he -- he hugged me. He said, friends? I didn't say anyting. I just said, friends. And then he let go of me, and somebody came in, so I left.

Q. Okay. Now, you say with his right hand he felt your breast outside your bra?

A. Yes.

Q. Is that correct?

A. (Witness nodded head affirmatively.)

Q. And then did he put his hand up underneath your bra and feel your breast?

A. Yes.

Q. Okay, how long did he do that?

A. A few seconds.

Q. All right. And what did he do with his hands after that while he was kissing you? You said something about behind in your pants?

A. He tried to go down the back of my pants.

Q. He tried to put his hand down inside your pants in the back?

A. Yes.

***

Q. And did you at any time give him consent to touch your breast?

A. No.

Q. He just did it?

A. Yes.

Q. Okay. Did you make any attempt to stop him?

A. No, I was stunned.

Q. You were stunned?

A. Frightened.

TR 101 - 106

***

2. CROSS EXAMINATION

A. No. He wanted to know what basically happened.

Q. Who is "he"?

A. Officer Kelly.

Q. And so you told him in the statement the important things; is that it?

A. Things that actually happened when he -- I didn't -- he didn't go all the way down my pants. That's why I didn't put that.

Q. I'm sorry, would you talk louder, please.

A. He didn't go all the way down my pants. I told him, no; so I left that out at the time.

Q. Well, the "he" is Mr. Perruccio?

A. Yes.

Q. He didn't go all the way down your pants?

A. Right. He went to try to go down my pants; and I said, no. So, I didn't tell Officer Kelly that.

Q. And so he didn't go down your pants, did he?

A. No. He tried to.

TR 121

***

Q. And as he turned you, you claim he immediately tried to put his hand on to your breast?

A. He kissed me and at the same time he put his hand up my shirt.

Q. Now, what did you do with your hands?

A. Just standing there (indicating).

Q. You didn't put your hands around him?

A. No.

Q. Did you try to kiss him back?

A. No.

Q. You just stood there with your hands straight by your side and did nothing (indicating)?

A. I didn't know what to do. I was just standing there. I was stunned. I was frightened. If I didn't do something -- I didn't know what to do.

Q. But anyway, you didn't put your arms around him?

A. No.

Q Now, you say that he put his hand then underneath your blouse?

A. Yes.

Q. And did he put it -- you say he put his hand directly on your breast; is that correct?

A. Yes.

Q. That's your claim, isn't it?

A. Yes.

Q. And he also then got his hand under your bra as well?

A. Yes.

Q. Did he try to take it off?

A. (Short pause.) He moved it up.

Q. He moved it up?

A. (Witness nodded head affirmatively).

***

Q. All right. Now you say that the touching of your breast took how long?

A. A few seconds.

Q. A few seconds. When you say "a few seconds," --

A. Maybe to a half a minute at most.

Q. I'm sorry, what?

A. Maybe to a half a minute at most.

Q. Oh, now it's to a half a minute.

A. Okay.

Q. Now, it's to a half a minute?

A. If you want to know, if you want a time limit. Maybe 15, I'm not exactly sure. I was frightened.

Q. Fifteen?

A. I didn't have a stopwatch on my arm.

Q. Fifteen minutes?

A. Seconds.

Q. Oh, I'm sorry. Okay, so you say anywhere from a few seconds to 15 seconds, to now over a minute?

A. Maybe a half a minute. I don't know, I didn't have a stopwatch on my hand.

Q. Now during all of this, during all this time is he still in the process of kissing you?

A. Yes.

Q. So his mouth is always on your lips?

A. Right. He was Frenching me.

Q. Oh, he was giving you a French kiss?

A. Yes, forced it.

Q. And so you opened your mouth for him to give you a French kiss?

A. He forced it.

Q. He forced your mouth open?

A. Right.

Q. Did you bite his tongue?

A. No.

Q. Now when is it then -- when is it when you then had an embrace, was it after this kissing and touching?

A. Was does "embrace" mean?

Q. Arms put around each other.

A. He hugged me.

Q. And you put your arms around him?

A. No.

Q. Oh, he just hugged you and you did not hug him back?

A. He hugged me, and he asked me, friends?

Q. I'm sorry?

A. He hugged me. It depends, which hug are you talking about, the first one where he tried to go down my pants afterwards or the one that -- I didn't put my arms around him at all. He hugged me and tried to go down my pants, and I said no. He hugged me again and said, friends? And I just said, friends, so I could get out.

I was hoping he'd let me go because I was frightened and I was scared because I wanted to get out of the room.

***

A. No, he was not -- he was feeling my breast for a few seconds.

Q. A few seconds?

A. Right.

Q. Was he squeezing it, or did he just touch it?

A. Sort of rubbed it. He sort of rubbed it

***

Q. And when he kissed you on the mouth, where was his left hand?

A. Around my back.

Q. That was over your shoulder onto your back?

A. Around my back.

Q. Was it under your -- Was it under your right arm or left arm, or was it over your back?

A. It was like that. Where he went like this (indicating).

Q. So his arm was outside --

A. Right.

Q. -- your arm?

A. Yes.

Q. And did you try to pull away from him?

A. No. I was scared. I was frightened he might hurt me or something.

Q. I'm sorry, I didn't hear that.

A. I was frightened that he might hurt me.

Q. Did he make any threats to you?

TR 139-147

***

3. REDIRECT EXAMINATION

Q. Did you have any opportunity to avoid his grabbing of your left breast?

A. No.

Q. He just did it before you could do anything about it?

A. That's right.

Q. And you had no warning that he was going to do that; is that right?

A. I had no warning.

Q. And you did not give him consent to do that?

A. No, I didn't.

TR 148

***

B - Dennis Perruccio

1. DIRECT EXAMINATION

Q. Dennis, you're the accused in this case?

A. Yes, I am.

Q. And how old are you?

A. Thirty-nine years old.

Q. What is your date of birth?

A. Six February, 1943.

TR 348

***